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IN THE

Supreme Court of the United States

October Term, 1966.

No. 1237.

M. LOIS CORSON, et al.,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR REHEARING OF PETITION FOR ALLOWANCE OF WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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PETITION FOR REHEARING OF PETITION FOR ALLOWANCE OF WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners respectfully request that this Court grant rehearing of its order dated May 22, 1967, which denied certiorari, and that the Court now grant certiorari.

The petition for certiorari previously filed herein presented the question whether petitioner's (Harry J. Alker, Jr.) constitutional rights had been violated particularly as provided by the Fifth Amendment thereto concerning due process and equal protection of the law.

The petitioner would like to go beyond that and prove that his constitutional rights were also violated under the Fourth and Sixth Amendments thereto concerning unlawful search and seizure and right to counsel.

The petitioner in his criminal tax case was subject to investigation by Internal Revenue agent Henry Segal and special agent Herbert S. Mednick of the Intelligence Division, Internal Revenue Service. All of the criminal case record was stipulated into the civil tax case record.

Henry Segal, in the criminal trial, testified he first got into Mr. Alker's case in the spring of 1950; that he first saw him on May 3, 1950, identified himself and told him the purpose of his visit was to examine his income tax returns, books and records for years 1947 and 1948; that he was assigned his returns and that he was to make a routine audit like any other taxpayer's returns. See joint Appendix Volume II, pages 313a, 314a and 324a.

Herbert S. Mednick, in the criminal trial testified that he was a special agent of the Intelligence Division of the Internal Revenue Service from March, 1946 to March, 1953; that while he was with the Service he first got into and worked upon the case of Harry J. Alker, Jr., in the summer of 1950; that when he first entered the case and first talked to Mr. Alker he told him who he was and that he was investigating his case.

That he further asked Mr. Alker for his books and records at said meeting on December 30, 1950. He testified (J. A. II, Pp. 408a, 409a) as follows, inter alia,

> "A. Well, I had—I introduced myself and asked him for the books and records at our first meeting, and his first reaction was that we had no right to them, and he thought we were not really agents of the Internal Revenue Service but agents of the Federal Deposit Insurance Corporation, and he first said he didn't want us to have them because we were going to give them to the Federal Deposit Insurance Corporation, which was interested in his financial position.
>
> Q. Did you tell him that you were with the Internal Revenue Service and not the F. B. I.?
>
> A. We tried to reassure him."

Special agent Mednick further testified that he asked Mr. Alker for all of his books of account, his ledgers, cancelled checks, his bank statements and any and all records of any kind. From all of his entire testimony he received the same for all the years involved from 1947 to 1950, inclusive; and it was from these books and records, petitioner's indictment was founded.

(Joint Index, Volume II, pages 407a, 409a).

As can readily be seen by the foregoing testimony the Special Agent never informed petitioner that he was a suspect in a criminal tax investigation which was then focused upon him, and that the investigation was no longer a routine tax audit like any other taxpayer's return. That he never fully identified himself, and neither showing him his credentials nor giving him any constitutional warning whatsoever.

It can also readily be seen that the said agents fraudulently deceived and misled the petitioner as to the true nature of their investigation, such as in United States v. Lipshitz, 132 F. Supp. 519 and Matter of Bodkin, 165 F. Supp. 25. That the petitioner's statements, books and records were not made and given freely and voluntarily by him. That substantially all of petitioner's books and records for the involved years were obtained after the special agent entered the case. These statements, books and records were protected by the Fourth and Fifth Amendments and did not have to be turned over to the Government agents by the petitioner, and he would not have turned them over had he been properly warned and apprised of the agents' real purpose. That he was misled into believing that they were only making a routine audit of his tax returns civilly and not criminally.

It is well known and acknowledged in law and fact that such a special agent is a policeman or criminal detective or investigator. That criminal tax investigations are conducted by special agents and that their sole function is to uncover evidence justifying a criminal prosecution. That

his investigation is a deceiving type of endeavor to obtain incriminating evidence through informal questioning and a search of the taxpayer's books and records. His investigation is usually started in response to information that a criminal violation has occurred or that there is a good possibility of such having occurred. His investigation therefore is not an open inquiry into an unsolved crime. The suspected tax evader is in the position of an accused person from the outset and the ring of evidence expands and builds around him.

It is contended that it is at the initial interview with the special agent that a taxpayer really needs his constitutional warnings and that is when his case is won or lost, and not in the Court trial.

In *United States v. Schoenberg,* 67-1 U. S. T. C. #9393 the Court found that under the provisions of the Internal Revenue Agent's Manual it is provided that upon the entry of a special agent it becomes a new investigation of a "criminal nature" and the civil tax liability is no longer involved. The Internal Revenue Agent's Manual specifically provides that the civil investigation is suspended.

In *Johnson v. Zerbst,* 304 U. S. 458, it was held ". . . if the accused does not affirmatively, knowingly and with the understanding of the consequences waive his right to counsel, then there has been a violation of the accused's Sixth Amendment guarantee," and this Honorable Supreme Court has held in *Escobedo v. Illinois,* 378 U. S. 478, that ". . . the focusing upon a particular suspect can occur prior to the indictment stage," and with respect to the interrogation of Mr. Alker at his office and the examination of his books and records by the special agent and revenue agent, it was as this Court observed in *Escobedo* that the petitioner had become the accused, and the purpose of the interrogation was to get him to confess his guilt, despite his Constitutional Rights not to.

There is no evidence in the criminal case record that the special agent or revenue agent gave the petitioner any

warning whatsoever that he was a suspect in a criminal prosecution nor advised him that he was entitled to have his personal counsel present at their interviews; that he could remain silent; that he did not have to turn over his books and records to them; that whatever he told them and whatever books, records and information he turned over to them would or might be used against him in a court of law; and that he did not have to incriminate himself or be a witness against himself. It is submitted and contended that all of the information was obtained from petitioner by fraud, misrepresentation and deceit of the agents, and not voluntarily given by petitioner and therefore should be suppressed and not used either in the criminal or civil case or in any manner. No conviction can stand in the face of constitutional mandates and may be attacked at any time. Such actions of the agents certainly deprived the petitioner of his freedom of action and of his liberty without due process of law. The agents did not have or never produced a lawful search warrant on any of their visits to the petitioner's office. There can be no question but that the conduct of the Government agents misled the petitioner into properly defending himself; and a Court should not forgive the requirements of the Fourth, Fifth and Sixth Amendments in the name of law enforcement.

The jeopardy assessments also restricted petitioner's constitutional rights as a citizen in that he was deprived of his moneys and property so that he could not properly defend himself by the timely employment of counsel and acountants. Jeopardy assessments as used by the Commissioner are too broad in their sweep and should be more greatly controlled and restricted by the Court.

Attached hereto, made part hereof and marked "Exhibit A" is a copy of a letter dated July 7, 1954, which discloses that a value of $265.00 was put upon the Freihofer Baking Company stock by the William Freihofer Baking Company. This contradicts the Government's valuation of $510.00 per share of said stock.

Petitioner feels equity and justice require the Court's attention should be called to his long illness and the illness of his accountant; and the difficulty of counsel in obtaining all the facts, particularly to the fact that he was chief counsel in many matters which covered many states and counties and in these it was necessary to associate counsel in each jurisdiction. The moneys received therefrom covered all counsel involved.

It appears petitioner was charged for substantially all of the moneys and credit was not given for shares paid to others. They also were for petitioner's legal charges and acountant's charges. Petitioner was only entitled to his portion and the accounting firm was entitled to its portion. The Internal Revenue Service charged petitioner with all of it. This was very unfair as it amounted to considerable.

The above are also reasons why the matter should be referred back for further clarification.

There have been many cases decided by the Federal Courts, District and Appellate, concerning the status of special agents' investigations and suppression of such evidence obtained therefrom, since petitioner's criminal trial, some of them being adverse to petitioner's contentions, particularly as to the question of voluntariness, while others uphold his contentions.

In these days of constitutional turmoil concerning the rights and privileges of an accused person as guaranteed by the United States Constitution and its amendments, certain cases such as *Massiah, Gideon v. Wainwright, Escobedo, Miranda, Johnson* and *Russo* did not exist at the time of petitioner's conviction, but *Boyd, Weeks, Gouled* and *Silverthorne* did, and it is submitted that the petitioner should be granted any and all benefits that he is entitled to from these decisions under the facts and circumstances of his case.

It is obvious that a taxpayer charged with violating the Internal Revenue Code is entitled to the same constitutional

protection as a person charged with committing a crime of violence. It is also obvious that when the special agent first visited the petitioner the routine investigation (if it was such) moved from the investigating stage to the accusatory stage where a criminal prosecution against petitioner was contemplated; and the agents procured their evidence from him by deceptive and fraudulent means, specifically, by attempting to obtain evidence for a criminal prosecution under the guise of conducting a routine audit.

The answers to these question in the criminal and civil tax field are of the greatest importance in their impact upon the administration of justice in the Federal Courts and this Honorable Supreme Court should now issue such guidelines for the future which should in turn greatly reduce litigation in the tax fields.

The petitioners feel and believe that their daily mail was intercepted by Government agents during their investigation. Petitioner, M. Lois Corson states several letters received by her in the mail had been slit open and then partially sealed. Petitioner, Harry J. Alker, Jr., also believes the same happened to his outgoing and incoming mail. However, upon their inquiry of the Honorable Solicitor General they were advised by him that a review of their case in accordance with the policy they announced to this Supreme Court in *United States v. Schipani*, 385 U. S. 37, produced no information subject to disclosure under that policy.

Petitioners submit that it is their belief and pray the Court to find that the fundamental protections of the constitution were not meant to be so easily evaded by Government officers. That the affirmance of their conduct would be unjust, unfair, inequitable, unconscionable and would unlawfully enrich the Government at the petitioners' great loss and expense.

There now exists clear and express conflicts of decisions among the Federal Courts as to the aforementioned questions and it is appropriate that the instant Alker case

be reviewed by this Honorable Supreme Court and the lower Courts' opinions be reversed or the matter sent back for further hearing with this Court's instructions pertaining to same. It is felt that in this manner an honest, fair and amicable finality could be consummated satisfactory to all parties concerned.

In *United States v. Davis,* 259 F. Supp. 496, 498 the Court refused to take the "huge step" that would extend *Miranda* to the field of "administrative investigation"; and another Court conceded that it "may be . . . that the rules prescribed by *Miranda* will apply with increasing sweep" to questioning by law enforcement officers. *United States v. Gleason,* 67-1 U. S. T. C. #9297. Other cases favorable to suppression are *United States v. Kingry,* 67-1 U. S. T. C. #9262 and *United States v. Gower,* 65-2 U. S. T. C. #15655.

Contrary thereto are *Kohatsu v. United States,* 351 F. 2d 898 (1965), Cert. denied, 384 U. S. 1011 (1966); *Rickey v. United States,* 360 F. 2d 32 (1966), Cert. denied, 385 U. S. (1966); *United States v. Fiore,* 258 F. Supp. 405, 441 (1966) and others.

In *United States v. Rundle,* 258 F. Supp. 647 (1966) (E. D. of Pa.) the Court in its opinion, page 655, refers to the case of *Davis v. State of North Carolina,* 384 U. S. 737, 86 S. Ct. 1761, 16 L. Ed. 2d 895, and quotes from it as follows:

> "The review of Voluntariness in Cases in which the trial was held prior to our decisions in Escobedo and Miranda is not limited in any manner by these decisions. On the contrary, the fact that a defendant was not advised of his right to remain silent or of his right respecting counsel at the outset of interrogatories, as is now required of Miranda, is a significant factor in considering the voluntariness of statements later made. This factor has now been recognized in several of our prior decisions dealing with standards of voluntariness . . . . Thus, the fact Davis was never effec-

tively advised of his rights gives added weight to the other circumstances described below which made his confession involuntary." (*Davis v. State of California,* 86 S. Ct. at page 1764). The Court then states, ". . . . It is not meaningful to characterize the relator's statement as involuntary or coerced in the sense that the police threatened him physically and thus overbore his will. Yet, in a larger sense, it is relevant to speak of the statement having been obtained by psychological coercion. See *United States ex rel. Perfiglia v. Rundle,* 221 F. Supp. 1003 (E. D. of Pa. 1963); and United States v. Wheeler, 149 F. Supp. 445.

Also see James A. Hewitt, "The Constitutional Rights of the Taxpayer in a Fraud Investigation," 44 Taxes 660 (1966), and Paul P. Lipton, "Constitutional Rights In Criminal Tax Investigations," American Bar Association Journal, June 1967, Vol. 53, Pages 517-521.

Conclusion.

For the reasons set forth in this Petition for Re-hearing, as well as in the Petition For Certiorari, previously filed, rehearing and certiorari should now be granted.

Respectfully submitted,

Robert M. Taylor

ROBERT M. TAYLOR,
Attorney for Petitioner.

Certificate of Counsel.

Pursuant to Rule 58, I hereby certify that the foregoing Petition For Rehearing is presented in good faith and not for delay, and is restricted to the grounds specified in paragraph 2 of Rule 58.

Robert M. Taylor

ROBERT M. TAYLOR,
Attorney for Petitioner.

Exhibit "A".

PEAT, MARWICK, MITCHELL & Co.
1500 Walnut Street
Philadelphia 2, Pa.

July 7, 1954

Mr. Ross D. Miller, President
Wm. Freihofer Baking Company
12 South 12th Street
Philadelphia, Pa.

Dear Mr. Miller:

This is in response to your inquiry as to the tax consequences of the proposed sale by Mrs. William Freihofer of 1,800 shares of common stock of Freihofer Baking Company, which she owns outright, to Wm. Freihofer Baking Company at a price per share consisting of $70 in cash and $195 in debentures of Wm. Freihofer Baking Company.

We understand that if Wm. Freihofer Baking Company secures options covering all of the common stock of Freihofer Baking Company and exercises such options, it will issue notes payable on the date of settlement to the various common stockholders of Freihofer Baking Company at the rate of $265 per share. We understand further that such notes will be paid at the rate of $70 per share in cash at 30 days after the date of settlement, the balance of $195 per share to be issued in debentures at 60 days after the date of settlement.

You have informed us that upon obtaining control, Wm. Freihofer Baking Company intends to borrow $600,000 from its wholly owned subsidiary, Freihofer Baking Com-

pany, and that such cash together with other funds of Wm. Freihofer Baking Company will be used to satisfy the cash requirements of $70 per share referred to above.

While it is impossible for us to have knowledge of the attitude of the Internal Revenue Service toward a transaction of the kind referred to herein or to have knowledge of future tax laws and court decisions, it is our opinion based upon our past experience that under the contemplated transaction described herein Mrs. Freihofer would not be subject to a Federal income tax on an alleged devidend arising from the transaction.

Yours very truly,

PEAT, MARWICK, MITCHELL & Co.

GCL:bc

cc: Mrs. William Freihofer
Ventnor & Oxford Avenues, Ventnor, N. J.

Mr. H. J. Alker
1505 Land Title Building, Phila., Pa.

Mr. A. N. Eckardt
Oxford Ayon Apartments, Oxford Avenue,
Ventnor, N. J.